82-1407

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

ALFRED F. NIGGLE and
BARBARA E. NIGGLE,

Petitioners,

v.

OLD KENT BANK AND TRUST COMPANY,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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ARGUMENT

I. THE PETITIONERS FAILED TO ASSERT THEIR CLAIMED FEDERAL RIGHT IN THE STATE COURTS.

The petition accurately states the facts of the case as far as it goes, but one omission is decisive. The petitioners' case was reviewed by Michigan courts at four levels, but never did the petitioners claim to be asserting any federal right. None of their state court pleadings or briefs refer to Article I, Section 10 of the United States Constitution, upon which they rely here, or any authority construing that provision. Instead, they relied only on Michigan cases interpreting Michigan law, which can hardly have framed the purported federal question for the state courts to consider.

This Court's decisions have settled beyond question the effect of such a failure. If the federal question is not duly asserted in the state court, it will not be

reviewed by the Supreme Court on appeal or writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); 13 Moore's Federal Practice ¶ 510.01, pp. 8-56 to 8-64 (2d Ed. 1982). Moreover, the federal question must be substantial. Zucht v. King, 260 U.S. 174 (1922); Moore's, supra ¶ 512.01, pp. 8-73 to 8-79. Thus, with the federal question being presented to this Court for the first time, the petition should be denied.

II. THE PETITIONERS' FEDERAL CLAIM HAS NO MERIT.

The petition correctly states that the prohibition against legislative impairment of the contracts contained in Article I, Section 10 of the United States Constitution is not generally violated by the judicial interpretation of legislation. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924); Mariniello v. Shell Oil Co., 511 F.2d 853, 859 (3d Cir. 1975). In this

case, the Michigan Court of Appeals' decision in Michigan National Leasing Corporation v. Cardillo, 103 Mich. App. 427, 302 N.W.2d 888 (1981), which is challenged by the petitioners, merely reversed an earlier construction of Article 10, Section 1 of the Michigan Constitution, which has been on the books unchanged since 1963. Since the petitioners did not execute their contract with the respondent until January 7, 1980, there was clearly no subsequent legislation to impair their contractual rights.

The petitioners try to invoke an exception based upon a judicial decision that gives effect to legislation enacted after a contract is formed. The exception does not apply in this case.

III. THERE IS ADEQUATE AND INDEPENDENT STATE GROUND FOR THE MICHIGAN COURTS' DECISION.

This Court has consistently declined

to review the judgments of state courts that rest on adequate and independent state grounds. As stated in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945):

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Here the state courts had no opportunity to "incorrectly adjudge federal rights", because the federal question was never presented to them. Even if it is assumed, however, that they would have decided the constitutional challenge erroneously, there was an independent basis for their decision, which did not involve any federal question. In fact, as described on pages 5 and 6 of the petition, the Michigan 61st District Court, which was the first state court to decide the case,

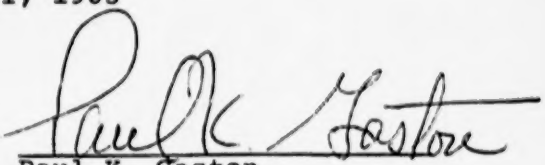
ruled against the petitioners without the benefit of the Cardillo decision. On the respondent's motion for summary judgment, the court ruled as a matter of law that the bank account against which the respondent set off was not her separate property, so that the defense of coverture did not apply in any event.

While it is true that, on appeal, the Kent County Circuit Court relied primarily on the Cardillo opinion, which had been rendered in the meantime, it did not reject the finding of the district court. Thus, this Court's ruling in favor of the petitioners on the merits would not be dispositive of the action, and the state courts on remand would be compelled to reconsider the original ground for the district court's decision.

CONCLUSION

Respondent asks the Court to deny the petition for writ of certiorari.

Dated: February 11, 1983



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